

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 4:05-CV-329-GKF-PJC
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

**STATE OF OKLAHOMA’S REPLY MEMORANDUM IN FURTHER SUPPORT OF  
MOTIONS *IN LIMINE* PERTAINING TO ALTERNATE SOURCES OF  
PHOSPHORUS AND BACTERIA TO THE IRW [DKT #2436] AND BACTERIAL OR  
PHOSPHORUS LEVELS IN OTHER WATERSHEDS [DKT #2411]**

Plaintiff, the State of Oklahoma (“the State”), hereby submits this reply memorandum in further support of its Motions *in Limine* Pertaining To Alternate Sources of Phosphorus and Bacteria To the IRW (Dkt. #2436) and Bacterial or Phosphorus Levels in Other Watersheds (Dkt. #2411).<sup>1</sup>

**I. ARGUMENT**

**A. The State’s Motion *in Limine* To Exclude Evidence of Bacterial or Phosphorus Levels in Waters Other Than Those of the IRW Should Be Granted**

In response to the State’s motion *in limine* to exclude evidence of bacterial or phosphorus levels in waters other than those of the IRW, Defendants argue that such evidence is relevant to the issue of whether causation exists. *See* Response, p. 5. Defendants’ argument fails on multiple levels. First and foremost, it fails because the fact that a watershed other than the IRW is contaminated by phosphorus or bacteria does not tend to prove, or tend to disprove,

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<sup>1</sup> Defendants mischaracterize the State’s motions *in limine* as seeking to exclude any and all discussion of such evidence. That is not correct. The State’s motions are particular as to the purposes for which the use of such evidence would be improper and, therefore, the proper subject of an *in limine* order.

that poultry waste is not a source of the phosphorus or bacteria in the IRW. Defendants' own expert, Dr. Herbert DuPont, agrees. *See* Dkt. #2411-2 (DuPont Dep., 59:23-60:18); *id.* at 60:16-18 ("Q: Okay. Does [the fact that other rivers or lakes might be contaminated] tell you anything about the source of the bacteria found in the IRW? A: No.").

Second, Defendants' argument fails because, in any event, they have no competent evidence to support such a comparison. Dr. Timothy Sullivan's effort to compare such water quality data from other watersheds with that of the IRW "is really questionable," in the words of the Court. (8/13/09 Hrg. Tr. at 88:23.) Specifically, Dr. Sullivan's methodology is lacking in scientific basis because Dr. Sullivan (1) did not compare bacteria water quality data to either single sample or 30-day geometric mean water quality standards or identify any violations of water quality standards in the IRW or in other parts of the State, and (2) lacked adequate data to determine whether bacterial geometric mean standards were violated outside the IRW.<sup>2</sup> *See* Dkt. #2071 & #2284.

Third, Defendants' argument fails because Dr. John Connolly's efforts to draw such a comparison between different water bodies are scientifically flawed. Specifically, Defendants point to Dr. Connolly's comparison of Lake Tenkiller to two other Oklahoma lakes, Sardis and Hugo, to justify the relevance of comparing other Oklahoma waters to argue that Lake Tenkiller water quality has not been degraded due to land application of poultry waste. Logic dictates that the relevance of such a comparison is dependant on Defendants' expert, Dr.

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<sup>2</sup> In a futile effort to rehabilitate Dr. Sullivan's opinions, Defendants now contend that "[t]o the extent that sufficient data exists to make an appropriate comparison Dr. Sullivan remains free to testify as to bacteria or phosphorus levels in other watersheds." *See* Response, p. 5 n.2. However, under Rule 26, Dr. Sullivan is restricted to the opinions disclosed. No such alternative comparison based on levels was disclosed in his report, and Defendants' efforts to offer such an opinion at trial should not be allowed.

Connolly, being able to establish two predicates. First, Dr. Connolly must show that, unlike Lake Tenkiller, Lakes Sardis and Hugo do not have land uses within their respective watersheds such that phosphorous and bacteria are not coming into these lakes due to land application of animal wastes. Second, Dr. Connolly must show that Lakes Sardis and Hugo have similar characteristics to Lake Tenkiller (e.g., similar phosphorus-load-to-lake-water-volume relationship, similar residence times of the water in the lakes, similar depths of water in the lakes, and whether the lakes are similarly stratified during the summer). As shown by Dr. Connolly's answers during his deposition, however, he and Defendants either ignored the existence of these factors<sup>3</sup> or that these factors are different between Lake Tenkiller and Lakes Sardis and Hugo.<sup>4</sup> There are simply too many confounding factors for Dr. Connolly to make a scientific comparison of these lakes. Moreover, such a flawed comparison would only serve to confuse the relationships between phosphorus and lake water quality and phosphorus entering the lake and land application of poultry waste.

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<sup>3</sup> Dr. Connolly admits that he did not do a study of phosphorus sources in each of the watersheds himself, relying instead on a verbal discussion with another defense expert. *See* Ex. A (Connolly Depo., pp. 291-98). Indeed, Dr. Connolly did not consider phosphorus sources and loadings. *See id.* (Connolly Depo., pp. 301-02).

<sup>4</sup> Dr. Connolly admits that the hydrology and other physical attributes of a reservoir can have a significant impact on the reservoir's water quality and one's ability to compare reservoirs to establish causes of water quality impairment. *See* Ex. A (Connolly Depo., pp. 298-99). Dr. Connolly, however, did not do sufficient study to determine if there were such differences between Tenkiller, Sardis and Hugo. *See id.* (Connolly Depo., p. 316). For example, Dr. Connolly admits that the depth of a reservoir can impact its water quality. *See id.* (Connolly Depo. pp. 300 & 336). There are substantial differences in the depths of Lake Tenkiller vis-à-vis the Hugo and Sardis reservoirs, but, Dr. Connolly did not consider this factor quantitatively when he did his comparison. *See id.* (Connolly Depo., pp. 324-25). In fact, when making his comparison, Dr. Connolly neglected to consider the impact of differences in watershed size, *see id.* (Connolly Depo., pp. 302-03), residence time of water, *see id.* (Connolly Depo., pp. 304-06, 310 & 314-15), reservoir shape, *see id.* (Connolly Depo., p. 317), flow, *see id.* (Connolly Depo., pp. 316-17), or stratification, *see id.* (Connolly Depo., pp. 325, 328-29 & 333).

And fourth, Defendants’ reliance on the Tenth Circuit’s comment that “IRW bacteria levels appear not to differ from bacteria levels in other bodies of water throughout Oklahoma, even where poultry farming is less common,” *see Attorney General of the State of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 778 (10th Cir. 2009), as a basis to establish the relevancy of this “evidence” is unavailing. As the Tenth Circuit noted, preliminary injunction proceedings involve “evidence that is less complete than in a trial on the merits.” *See id.* at 776. The record for trial is far more developed. Indeed, the testimony from Defendants’ own expert demonstrates that bacterial or phosphorus levels in waters other than those of the IRW is not relevant to disproving causation. *See* Dkt. #2411-2 (DuPont Dep., 59:23-60:18).

For all of these reasons, the State’s motion *in limine* to exclude evidence of bacterial or phosphorus levels in waters other than those of the IRW for the purposes of showing a lack of causation should be granted.

**B. The State’s Motion *in Limine* Pertaining To Other Contributors of Phosphorus and Bacteria to the IRW Should Also Be Granted**

In response to the State’s motion *in limine* seeking to exclude for certain purposes evidence relating other contributors of phosphorus and bacteria in the IRW, Defendants argue that such evidence is relevant to show the State’s “inability to prove that poultry litter, as opposed to some other source, is responsible for bacteria or phosphorous found in the waters of the IRW, . . . the availability of joint and several liability, and the Court’s determinations regarding injunctive relief.” *See* Response, p. 1. Defendants are wrong on these three fronts.

**1. Causation**

Defendants contend that “evidence of other sources of bacteria and phosphorus in the IRW and of similar bacteria and phosphorus levels in waters outside the IRW . . . is relevant to causation.” Response, p. 2. This is not correct as a blanket statement. As Chief Judge Eagan

held in *City of Tulsa*, evidence of other contributions of phosphorus could be relevant for the purpose of “defendants’ proof of *want of causation*.” *City of Tulsa*, 258 F. Supp. 2d at 1302. This is not a statement that other contributors are relevant to causation *generally*, but rather for the purpose of showing *want of causation*. Such an exception does not apply here, where Defendants have no evidence to prove *want of causation*. There is no genuine dispute in this case that land-applied poultry waste is a cause of water pollution in the IRW. *See* Dkt. #2199-2, ¶ 42 (Defendants admitting that “phosphorus is contributed to stream water during high-flow events from point and non-point sources” [emphasis added]); Dkt. #2200, ¶ 44 (admitting “[p]oultry litter is one of multiple sources of phosphates in the watershed . . .”). Thus, Defendants cannot use evidence of other sources of contamination to prove *want of causation*. Reciting general principles of causation as an element of tort claims, as Defendants do (*see* Response, p. 2) does not instruct otherwise.

## **2. Joint and Several Liability**

Defendants acknowledge that “joint and several liability may apply if the harm suffered is ‘indivisible’ . . . .” Response, p. 6. Defendants argue, however, that “where the plaintiff has contributed to its own injury, the indivisible injury theory does not apply and, as a result, joint and several liability is not available.” *Id.* Thus, they claim, evidence of the State’s alleged contributions of phosphorus and bacteria to the IRW is relevant.<sup>5</sup> This is not the law.

Because the State’s claims (as the case is currently postured) are intentional torts, the defense of contributory negligence is not available. *See* Restatement (Second) of Torts § 840B(2) (“When the harm is intentional, or the result of recklessness, contributory negligence is not a defense.”). This was precisely one of Chief Judge Eagen’s conclusions in

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<sup>5</sup> Notably, Defendants do not claim that anyone else’s contributions of phosphorus and bacteria to the IRW is relevant for this purpose.

*City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263, 1302 (N.D. Okla. 2003), *vacated in connection with settlement*. See also *Graham v. Keuchel*, 847 P.2d 342, 363 (Okla. 1993).

Simply put, any evidence relating to the State's alleged contributions of phosphorus and bacteria to the IRW is simply irrelevant to the question whether joint and several liability applies. Any possible probative value of such evidence would be substantially outweighed by the danger of confusion of the issues for the jury.

In sum, because liability under Counts IV, V, and VI is joint and several, evidence of other contributors of phosphorus and bacteria to the IRW should be precluded for the purpose of implying or arguing that any or all Defendants are not jointly and severally liable.

### **3. Injunctive Relief**

Finally, Defendants improperly argue that evidence of other contributors of bacteria and phosphorus to the IRW is relevant to the Court's fashioning of injunctive relief. Simply put, Defendants cite *no* authority for this proposition. *Hecht* (which Defendants cite only for the discretionary standard) and *Weinberger* (also cited by Defendants) do not stand for such proposition.

Moreover, contrary to Defendants' suggestion, the fact that the Court enjoys discretion to fashion injunctive relief does not render relevant the contributions of phosphorus and bacteria to the IRW by other individuals or entities against whom claims for injunctive relief are not pending.

Finally, Defendants claim that evidence regarding other contributors of bacteria and phosphorus levels in the IRW is somehow relevant because "[a]n injunction should issue only where the intervention of a court of equity is essential in order effectually to protect property rights against injuries otherwise irreparable," (Defs.' Brf. at 7) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). Defendants' argument that they would use such

evidence to show that the harm to the IRW is irremediable lacks credulity. Defendants do not have any expert testimony (and do not cite any in their Response) to support their latest proposition that evidence of other contributors of phosphorus and bacteria is relevant “to determining whether the harm is irreparable.” Response, p. 7. They simply fail to make any showing as to how such evidence bears on the issues at hand.

Finally, Defendants’ reference on page 7 to the denial of the State’s motion for a preliminary injunction as support for their opposition to the State’s Motion is wholly inappropriate and should not be countenanced. *See State of Oklahoma*, 565 F.3d at 776 (“the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits” (internal quotation marks omitted)); *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 561 F. Supp. 2d 368, 382 (S.D.N.Y. 2008) (“findings of fact and conclusions of law made on a motion for preliminary injunction are not binding on the Court when deciding a motion for summary judgment” in part because “parties are held to different standards of proof in preliminary injunction hearings than in motions for summary judgment” (internal quotation marks omitted)); *Krauth v. Executive Telecard, Ltd.*, No. 95 Civ. 3967, 1996 U.S. Dist. LEXIS 669, at \*32 (S.D.N.Y. Jan. 24, 1996) (“decision on a preliminary injunction hearing does not conclusively decide issues of fact and a court, on a subsequent motion, is not bound by its former decision which applied preliminary injunction standards”); *see also* 11A Charles Alan Wright, *et al.*, Federal Practice & Procedure § 2950 (2009) (“provisional decisions should not be used outside the context in which they originally were rendered”).

## II. CONCLUSION

Based on the foregoing and the State's initial briefs, the State respectfully requests that the Court grant its Motions *in Limine* (Dkt. #2411 & #2436).

Respectfully Submitted,

W.A. Drew Edmondson OBA # 2628  
ATTORNEY GENERAL  
Kelly H. Foster OBA #17067  
ASSISTANT ATTORNEY GENERAL  
State of Oklahoma  
313 N.E. 21<sup>st</sup> St.  
Oklahoma City, OK 73105  
(405) 521-3921

M. David Riggs OBA #7583  
Joseph P. Lennart OBA #5371  
Richard T. Garren OBA #3253  
Sharon K. Weaver OBA #19010  
Robert A. Nance OBA #6581  
D. Sharon Gentry OBA #15641  
David P. Page OBA #6852  
RIGGS, ABNEY, NEAL, TURPEN,  
ORBISON & LEWIS  
502 West Sixth Street  
Tulsa, OK 74119  
(918) 587-3161

Louis W. Bullock OBA #1305  
Robert M. Blakemore OBA 18656  
BULLOCK, BULLOCK & BLAKEMORE  
110 West Seventh Street Suite 707  
Tulsa OK 74119  
(918) 584-2001

Frederick C. Baker  
(admitted *pro hac vice*)  
Elizabeth Claire Xidis  
(admitted *pro hac vice*)  
MOTLEY RICE LLC  
28 Bridgeside Boulevard  
Mount Pleasant, SC 29465  
(843) 216-9280



/s/ Ingrid L. Moll

William H. Narwold

(admitted *pro hac vice*)

Ingrid L. Moll

(admitted *pro hac vice*)

Mathew P. Jasinski

(admitted *pro hac vice*)

MOTLEY RICE LLC

20 Church Street, 17<sup>th</sup> Floor

Hartford, CT 06103

(860) 882-1678

Jonathan D. Orent

(admitted *pro hac vice*)

Michael G. Rousseau

(admitted *pro hac vice*)

Fidelma L. Fitzpatrick

(admitted *pro hac vice*)

MOTLEY RICE LLC

321 South Main Street

Providence, RI 02940

(401) 457-7700

Attorneys for the State of Oklahoma

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 4th day of September, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	fc_docket@oag.ok.gov
Kelly H. Foster, Assistant Attorney General	kelly_burch@oag.ok.gov
M. David Riggs	driggs@riggsabney.com
Joseph P. Lennart	jlennart@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
Robert A. Nance	rnance@riggsabney.com
D. Sharon Gentry	sgentry@riggsabney.com
David P. Page	dpage@riggsabney.com
RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS	
Louis Werner Bullock	lbullock@bullock-blakemore.com
Robert M. Blakemore	bblakemore@bullock-blakemore.com
BULLOCK, BULLOCK & BLAKEMORE	
Frederick C. Baker	fbaker@motleyrice.com
Elizabeth Claire Xidis	cxidis@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Ingrid L. Moll	imoll@motleyrice.com
Jonathan D. Orent	jorent@motleyrice.com
Michael G. Rousseau	mrousseau@motleyrice.com
Fidelma L. Fitzpatrick	ffitzpatrick@motleyrice.com
MOTLEY RICE LLC	
<b><u>Counsel for State of Oklahoma</u></b>	
Robert P. Redemann	rredemann@pmrlaw.net
PERRINE, MCGIVERN, REDEMANN, REID, BARRY & TAYLOR, P.L.L.C.	
David C. Senger	david@cgmlawok.com
Robert E Sanders	rsanders@youngwilliams.com
Edwin Stephen Williams	steve.williams@youngwilliams.com
YOUNG WILLIAMS P.A.	
<b><u>Counsel for Cal-Maine Farms, Inc and Cal-Maine Foods, Inc.</u></b>	
John H. Tucker	jtucker@rhodesokla.com

Theresa Noble Hill	thill@rhodesokla.com
Colin Hampton Tucker	ctucker@rhodesokla.com
Kerry R. Lewis	klewis@rhodesokla.com
RHODES, HIERONYMUS, JONES, TUCKER & GABLE	
Terry Wayen West	terry@thewestlawfirm.com
THE WEST LAW FIRM	
Delmar R. Ehrich	dehrich@faegre.com
Bruce Jones	bjones@faegre.com
Krisann C. Kleibacker Lee	kklee@faegre.com
Todd P. Walker	twalker@faegre.com
Christopher H. Dolan	cdolan@faegre.com
Melissa C. Collins	mcollins@faegre.com
Colin C. Deihl	cdeihl@faegre.com
Randall E. Kahnke	rkahnke@faegre.com
FAEGRE & BENSON, LLP	
<b><u>Counsel for Cargill, Inc. &amp; Cargill Turkey Production, LLC</u></b>	
James Martin Graves	jgraves@bassettlawfirm.com
Gary V Weeks	gweeks@bassettlawfirm.com
Woody Bassett	wbassett@bassettlawfirm.com
K. C. Dupps Tucker	kctucker@bassettlawfirm.com
Earl Lee "Buddy" Chadick	bchadick@bassettlawfirm.com
Vincent O. Chadick	vchadick@bassettlawfirm.com
BASSETT LAW FIRM	
George W. Owens	gwo@owenslawfirmmpc.com
Randall E. Rose	rer@owenslawfirmmpc.com
OWENS LAW FIRM, P.C.	
<b><u>Counsel for George's Inc. &amp; George's Farms, Inc.</u></b>	
A. Scott McDaniel	smcdaniel@mhla-law.com
Nicole Longwell	nlongwell@mhla-law.com
Philip Hixon	phixon@mhla-law.com
Craig A. Merkes	cmerkes@mhla-law.com
MCDANIEL, HIXON, LONGWELL & ACORD, PLLC	
Sherry P. Bartley	sbartley@mws gw.com
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC	
<b><u>Counsel for Peterson Farms, Inc.</u></b>	

John Elrod	jelrod@cwlaw.com
Vicki Bronson	vbronson@cwlaw.com
P. Joshua Wisley	jwisley@cwlaw.com
Bruce W. Freeman	bfreeman@cwlaw.com
D. Richard Funk	rfunk@cwlaw.com
CONNER & WINTERS, LLP	
<b><u>Counsel for Simmons Foods, Inc.</u></b>	
Stephen L. Jantzen	sjantzen@ryanwhaley.com
Paula M. Buchwald	pbuchwald@ryanwhaley.com
Patrick M. Ryan	pryan@ryanwhaley.com
RYAN, WHALEY, COLDIRON & SHANDY, P.C.	
Mark D. Hopson	mhopson@sidley.com
Jay Thomas Jorgensen	jjorgensen@sidley.com
Timothy K. Webster	twebster@sidley.com
Thomas C. Green	tcgreen@sidley.com
Gordon D. Todd	gtodd@sidley.com
SIDLEY, AUSTIN, BROWN & WOOD LLP	
Robert W. George	robert.george@tyson.com
L. Bryan Burns	bryan.burns@tyson.com
Timothy T. Jones	tim.jones@tyson.com
TYSON FOODS, INC	
Michael R. Bond	michael.bond@kutakrock.com
Erin W. Thompson	erin.thompson@kutakrock.com
Dustin R. Darst	dustin.darst@kutakrock.com
KUTAK ROCK, LLP	
<b><u>Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., &amp; Cobb-Vantress, Inc.</u></b>	
R. Thomas Lay	rtl@kiralaw.com
KERR, IRVINE, RHODES & ABLES	
Frank M. Evans, III	fevans@lathropgage.com
Jennifer Stockton Griffin	jgriffin@lathropgage.com
David Gregory Brown	
LATHROP & GAGE LC	
<b><u>Counsel for Willow Brook Foods, Inc.</u></b>	
Robin S Conrad	rconrad@uschamber.com
NATIONAL CHAMBER LITIGATION CENTER	

Gary S Chilton	gchilton@hcdattorneys.com
HOLLADAY, CHILTON AND DEGIUSTI, PLLC	
<b><u>Counsel for US Chamber of Commerce and American Tort Reform Association</u></b>	
D. Kenyon Williams, Jr.	kwilliams@hallestill.com
Michael D. Graves	mgraves@hallestill.com
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON	
<b><u>Counsel for Poultry Growers/Interested Parties/ Poultry Partners, Inc.</u></b>	
Richard Ford	richard.ford@crowedunlevy.com
LeAnne Burnett	leanne.burnett@crowedunlevy.com
CROWE & DUNLEVY	
<b><u>Counsel for Oklahoma Farm Bureau, Inc.</u></b>	
Kendra Akin Jones, Assistant Attorney General	Kendra.Jones@arkansasag.gov
Charles L. Moulton, Sr Assistant Attorney General	Charles.Moulton@arkansasag.gov
<b><u>Counsel for State of Arkansas and Arkansas National Resources Commission</u></b>	
Mark Richard Mullins	richard.mullins@mcafeetaft.com
MCAFEE & TAFT	
<b><u>Counsel for Texas Farm Bureau; Texas Cattle Feeders Association; Texas Pork Producers Association and Texas Association of Dairymen</u></b>	
Mia Vahlberg	mvahlberg@gablelaw.com
GABLE GOTWALS	
James T. Banks	jtbanks@hhlaw.com
Adam J. Siegel	ajsiegel@hhlaw.com
HOGAN & HARTSON, LLP	
<b><u>Counsel for National Chicken Council; U.S. Poultry and Egg Association &amp; National Turkey Federation</u></b>	
John D. Russell	jrussell@fellerssnider.com
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS, PC	
William A. Waddell, Jr.	waddell@fec.net
David E. Choate	dchoate@fec.net

FRIDAY, ELDREDGE & CLARK, LLP	
<b><u>Counsel for Arkansas Farm Bureau Federation</u></b>	
Barry Greg Reynolds	reynolds@titushillis.com
Jessica E. Rainey	jrainey@titushillis.com
TITUS, HILLIS, REYNOLDS, LOVE, DICKMAN & MCCALMON	
Nikaa Baugh Jordan	njordan@lightfootlaw.com
William S. Cox, III	wcox@lightfootlaw.com
LIGHTFOOT, FRANKLIN & WHITE, LLC	
<b><u>Counsel for American Farm Bureau and National Cattlemen's Beef Association</u></b>	
Duane L. Berlin	dberlin@levberlin.com
LEV & BERLIN PC	
<b><u>Counsel for Council of American Survey Research Organizations &amp; American Association for Public Opinion Research</u></b>	

Also on this 4th day of September, 2009, I mailed a copy of the above and foregoing pleading to:

**Thomas C. Green** -- via email: tcgreen@sidley.com  
Sidley, Austin, Brown & Wood LLP

**Dustin McDaniel**  
**Justin Allen**  
Office of the Attorney General (Little Rock)  
323 Center St, Ste 200  
Little Rock, AR 72201-2610

**Steven B. Randall**  
58185 County Rd 658  
Kansas, OK 74347

**Cary Silverman** -- via email: csilverman@shb.com  
**Victor E Schwartz**  
Shook Hardy & Bacon LLP (Washington DC)

/s/ Ingrid L. Moll  
Ingrid L. Moll